

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY
NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

SEP 15 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0085-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MARK FILLMORE CHISHOLM,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20021306 and CR-20030293 (Consolidated)

Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

DiCampli, Elsberry & Hunley, LLC
By Anne Elsberry

Tucson
Attorneys for Petitioner

V Á S Q U E Z, Judge.

¶1 Petitioner Mark Chisholm was convicted after a bench trial of two counts of fraud in insolvency and one count of conspiracy to commit theft, perjury, and fraud in insolvency. The trial court suspended the imposition of sentence and placed Chisholm on

concurrent terms of probation. We affirmed the convictions and the probationary terms on appeal, rejecting Chisholm's challenge that there was insufficient evidence to support the convictions. *State v. Chisholm*, Nos. 2 CA-CR 2005-0139, 2 CA-CR 2005-0195 (consolidated) (memorandum decision filed Feb. 26, 2007). In this petition for review, Chisholm contends the trial court erred when it denied his petition for post-conviction relief, suggesting at the very least he was entitled to an evidentiary hearing. Absent a clear abuse of discretion, we will not disturb the court's ruling. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 We note at the outset that Chisholm has raised certain claims of trial court error that are independent of his claim of ineffective assistance of appellate counsel. He contends the trial court's failure to rule on evidentiary objections or delay in making such rulings rendered it unclear what evidence it had relied on in finding him guilty of the offenses. The court correctly denied relief on those claims because they are precluded; they could have been raised on appeal. Ariz. R. Crim. P. 32.2(a)(3).

¶3 Nor has Chisholm established the trial court abused its discretion when it denied relief on his claim that appellate counsel had been ineffective for failing to raise certain claims on appeal. Chisholm asserted, inter alia, that appellate counsel had been ineffective for failing to challenge the introduction of evidence from and about the bankruptcy proceeding, including his wife's testimony in the bankruptcy and receivership proceedings. We did, in our memorandum decision on appeal, comment on the poor quality

of Chisholm's briefs, noting counsel had failed to cite the record and otherwise failed to comply with the applicable rules of criminal procedure in a variety of respects. *Chisholm*, Nos. 2 CA-CR 2005-0139 & 2 CA-CR 2005-0195, n.8. Nevertheless, Chisholm failed to raise a colorable claim of ineffective assistance of appellate counsel, warranting neither relief nor an evidentiary hearing.

¶4 The trial court clearly identified and addressed Chisholm's claims in a thorough minute entry, resolving the claims correctly and specifying the bases for its ruling in a manner that permits this or any other court to review the order. *See Swoopes*, 216 Ariz. 390, ¶ 47, 166 P.3d at 959. No purpose would be served by rehashing the order here; therefore, we adopt it. *See id.* On review, Chisholm has failed to sustain his burden of establishing that the trial court abused its discretion. Instead, he reasserts his claims in a summary fashion, much as he asserted the claim of ineffective assistance of counsel below, rarely citing any portion of the record, any applicable case law, or any other authority supporting his claims, and contending counsel was ineffective without specifying precisely how or why he is entitled to relief.

¶5 Chisholm seems to be asking this court to apply an extraordinary standard to his case in evaluating whether he should have been granted relief for appellate counsel's alleged ineffectiveness. To be entitled to relief based on a claim of ineffective assistance of counsel, the defendant must establish counsel's performance was both deficient, based on prevailing professional norms, and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687

(1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). The defendant must show there is a reasonable probability that, but for counsel's deficient performance, the outcome of the case would have been different. *State v. Lee*, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984). "In the context of appellate counsel, the petitioner must demonstrate a reasonable probability that but for counsel's deficient performance, the outcome of the appeal would have been different." *State v. Febles*, 210 Ariz. 589, ¶ 18, 115 P.3d 629, 635-36 (App. 2005). A defendant's failure to satisfy either element of this test is fatal to the claim for relief. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). A defendant is only entitled to relief if he raises a colorable claim for relief. *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). A colorable claim is one which, if true, might have changed the outcome of the case. *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986).

¶6 Chisholm states:

Petitioner acknowledges that in order to succeed on this issue he must make a showing that but for the deficient performance of appellate counsel the outcome would have been different. However, the scope of the ineffectiveness of appellate counsel subsumes this issue and Petitioner requests that the Court review this issue without a specific showing of what issue might have changed the course of Petitioner's appeal.

We will not apply a different standard in reviewing Chisholm's claims. It is the burden of the defendant seeking relief to demonstrate to the trial court how counsel's performance was deficient and how those deficiencies affected the outcome of the case. *Strickland*, 466 U.S. at 687. In the absence of a showing that counsel's performance was tantamount to no legal

representation at all, *see United States v. Cronin*, 466 U.S. 648, 654-55 (1984), the mere fact that counsel’s performance was repeatedly and cumulatively deficient is not a substitute for the prejudice portion of the *Strickland* test. Neither below nor on review has Chisholm done anything more than assert in general, conclusory terms that appellate counsel was ineffective.

¶7 Although we grant Chisholm’s petition for review, we deny relief because Chisholm has failed to establish the trial court abused its discretion when it denied relief.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge